Supreme Court, U.S.
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No. 03-584

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IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH CORDO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the "scheme or artifice to defraud" which is necessary to a federal mail fraud prosecution be based on the mere failure to disclose material facts, where no fiduciary or other special relationship exists and no positive law creates a duty to disclose the omitted facts?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Cordo and respondent United States). A petition for certiorari by Cordo's co-defendant at trial and co-appellant below, R. Steven Stackpole, was denied on October 6, 2003, at No. 03-5089. The third co-defendant and co-appellant, Jeffrey Klepper, does not appear to have filed a petition for certiorari.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph M. Cordo respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence for conspiracy to commit mail fraud and related money laundering, involving his activity in selling investments to individuals and funeral homes.

OPINIONS BELOW

The Third Circuit's precedential Opinion (per Rendell, J., with Nygaard and Alito, JJ.), was filed April 4, 2003; see *United States v. Cordo*, 324 F.3d 223 (3d Cir. 2003). A copy is attached as Appendix A. That opinion incorporates, in part, a non-precedential opinion filed April 3 in his co-appellants' cases (*United States v. Stackpole*, available at 2003 WL 1785929, 64 Fed.Appx. 842), which is therefore attached as Appendix B. In the published opinion, the panel vacated the judgment as to applicant Cordo and remanded for resentencing; his convictions, however, were affirmed for reasons given in the unpublished opinion. The United States District Court for the Middle District of Pennsylvania (Caldwell, J.) wrote no opinion in this case.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the applicant's convictions on mail fraud conspiracy and money laun-

dering charges was filed and entered on April 4, 2003. Appx. A. The applicant's timely petition for rehearing was denied by the Third Circuit on May 20, 2003. Appx. C. By Order dated August 12, 2003, Justice Souter extended until October 17, 2003, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark on or before that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE INVOLVED

Section 1341 of title 18, United States Code, the federal mail fraud law, as amended in 1994, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier ... shall be fined under this title or imprisoned not more than five years, or both. ....

18 U.S.C. § 1341.

STATEMENT OF THE CASE

This petition presents an important and recurring question concerning the scope of the federal mail fraud statute, an issue with which this Court has grappled repeatedly over the past 90 years. Petitioner was convicted after a trial on charges that he schemed to defraud in connection with certain investments, which the indictment, evidence, and prosecutors' argument claimed was accomplished both by false statements and by failing to disclose material facts. The jury instructions authorized conviction on either or both bases.

a. ***Procedural History***

Petitioner Joseph Cordo, an insurance salesman, was convicted after a jury trial in the Middle District of Pennsylvania on charges of conspiring to defraud individuals who purchased a phony investment vehicle, 18 U.S.C. §§ 371, 1341 (conspiracy to commit mail fraud) and with profiting from a fraudulent investment sold to funeral home operators, id. § 1956 (money laundering). The district court originally sentenced Mr. Cordo to serve 96 months' imprisonment. The court also ordered him to pay restitution (joint and several liability) in various amounts to a list of 27 individuals, totaling $1.2 million, to pay special assessments of $1500, and to forfeit his interest in certain property. No fine was levied.

The indictment, the prosecutors' opening and rebuttal arguments at trial, the trial evidence, and the jury instructions in this case were all premised on twin theories: fraud by misrepresentations and fraud by omission of material facts. The fraud-by-omissions theory constituted a substantial part of the government's case, and under the court's instructions the jury was authorized to convict on either.

The defendant took a timely appeal to the United States Court of Appeals for the Third Circuit. On appeal he raised several issues, one of which challenged the jury instructions concerning mail fraud, insofar as the trial court allowed conviction for mere omission of material facts, without requiring the jury to find a fiduciary relationship if it did not rely on affirmative misrepresentations in support of its verdict. Petitioner contended the federal law of mail (or wire) fraud does not encompass a theory of fraud by omission, in the absence of either a fiduciary relationship or a legally imposed duty of disclosure. As a result, he argued, the trial court committed plain error by informing the jury that a material omission qualifies (without more) as a "misrepresentation" for purposes of mail fraud.

On April 4, 2003, the court of appeals filed its opinion and judgment affirming petitioner's convictions, Appx. A8 & n.3, for the reasons given in a non-precedential opinion filed the previous day in his co-appellants' case. Appx. B. The court reversed his sentence, however, because the sentencing court had wrongly treated the money laundering charges as forming under the U.S. Sentencing Guidelines a "group of closely related counts" separate from the mail fraud conspiracy. United States v. Cordo, 324 F.3d 223 (3d Cir. 2003); Appx. A9-22. On remand, on July 10, 2003, the court corrected its "grouping" error and resentenced petitioner to serve a term of 78 months, with all other aspects of the sentence to remain the same. Petitioner Cordo did not appeal that judgment. He continues in custody serving his amended sentence.

b. *Statement of Facts*[1]

Gavin Greene and Steven Stackpole formed an investment company, Entertainment Architects ("EA"), which was selling a program called the "Prime Trust Guarantee." In order to attract investors, Greene and Stackpole fabricated promotional documents and literature, falsely suggesting that investments in EA would be secured by commercial real estate and other holdings. In the early 1990s, petitioner Joseph Cordo, an insurance salesman, was introduced to Stackpole and eventually began selling EA's products.

In late 1994, Stackpole and Greene incorporated in New Jersey as EA International ("EAI"), and formed EA International Trust ("EAIT"), a wholly owned subsidiary of EAI, with themselves as trustees. This new investment company, EAIT, then opened an account with Maidstone Financial, Inc., a New York investment banking firm which was itself engaged in fraudulent activities. For investors, the new program would -- at least nominally -- include positions in blue chip stocks as well as the opportunity to participate in IPOs supposedly being underwritten by Maidstone. Investors were guaranteed a 12% annual return over five years. They were assured no risk of loss and that their funds were fully insured and IRA-qualified for tax purposes. Further, investors were told that no charges, fees, or commissions would be deducted from their investments.

All of these representations were complete fabrications. The funds were not insured, the plan was not IRA qualified, there was no way of guaranteeing returns, and

[1] The following Statement is closely based on that of the court of appeals. *See* Appx. A2-6.

extensive commissions and fees were deducted from the investments from the outset. Further, EA never disclosed that its sales force, such as Stackpole and Cordo, were not licensed to sell securities, nor that several of the individuals involved, including Stackpole and another co-defendant, Jeffrey Klepper, had been respectively sued for and convicted of fraudulent activities.

Between late 1994 and April 1997, 34 individuals invested $1.5 million in the program. Contrary to EA's representations, however, less than one third of that total was ever deposited into the Maidstone account, and the only other "investments" made by EA were the purchase of a two-bedroom condominium in New Jersey and a topless dance club in the Bronx, for a total of approximately $140,000.

Separate from the Maidstone investment activity, EA saw a potential market in obtaining better returns for funeral home directors on "pre-need" funds -- money collected as prepayments for funeral services. Stackpole, Klepper, and Cordo were all involved in the exploration and development of the pre-need business, and another company, Commonwealth Partnership Trust ("CPT"), was formed by Klepper and Cordo to handle much of the day-to-day operations of the new venture.

Pennsylvania law requires that pre-need funds be deposited in trust with a Pennsylvania Bank. In 1996, EAIT entered into an agreement with Nazareth National Bank whereby Nazareth would accept pre-need funds from funeral homes and immediately deposit them with EAIT for investment. The homes were guaranteed at least 7% in annual returns, as well as the secondary benefit of having CPT assume the relevant record-

keeping obligations. CPT was also responsible for marketing the venture to funeral homes, and for its part EAI agreed to pay CPT 20% of each dollar invested.

Some time in 1996, petitioner Cordo significantly reduced his participation in EAIT's investment operations to assist in the care of his father, who had been diagnosed with cancer. Although not heavily involved in the daily operations of CPT, Cordo remained the company's Vice President and was paid upt to 4% of every dollar invested in the program.

Things began unraveling for EAIT in late 1997. Nazareth was served with a subpoena requesting all documents relating to its dealings with EAIT, and learned that Stackpole had been indicted for the misappropriation of $1.4 million of investments in the late 1980s and early 1990s, prior to the creation of EA. As a result, Nazareth immediately demanded an accounting, and subsequently discovered that less than half of its $5 million had been deposited into the Maidstone account.

After forcing Stackpole's resignation, Nazareth attempted to cover the death claim liabilities by obtaining one year term life insurance policies on the lives of the funeral homes' pre-need customers. On February 28, 1998, EAIT's Maidstone account, which by that time was worth only $440,000, was liquidated. EAIT's Park Avenue offices were abandoned in March, and in May Greene reported to Klepper and Cordo that EA had absolutely no remaining assets.

Nonetheless, the ventures continued to represent to investors that they remained in business. In July 1998 (two years after petitioner had withdrawn from active participation), in a phone conversation recorded by law enforcement personnel, for example, Klepper repre-

sented to an investor that EAIT was still in business and assured him that his investments were safe. Finally, a refund check to one investor who sought the return of his $7,000 investment was sent from EAIT after Cordo personally wired the money to the EAIT account.

Ultimately, the losses from the various schemes totaled approximately $5.9 million.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASON FOR GRANTING THE WRIT

The Third Circuit's ruling in this case conflicts with decisions of other circuits, based on a historical understanding of "fraud" as reflected in this Court's cases, which exclude mere omission from the scope of prosecutable mail fraud schemes.

In conflict with the law of every circuit to have examined the issue in any depth, and in conflict with more than a century of this Court's case law, the court below held that the jury instructions delivered in this case were proper, even though they allowed mail fraud convictions for nothing more than failure to disclose, while selling an investment, adverse facts about the salesmen and their product, in the absence of active concealment or any fiduciary relationship or affirmative legal duty. Certiorari should be granted to establish the proper application of this important federal criminal statute.[2]

The indictment alleged that omission of material facts was key to the fraud scheme in this case, and the prosecutor in arguing the case to the jury emphasized that theory. The government did not request a jury instruction allowing conviction for mere omissions, however, but only for active and fraudulent concealment of material facts. Nevertheless, as framed and delivered, the jury instructions endorsed the idea that a conviction

[2] The concept of a "scheme or artifice to defraud," legislatively undefined under the mail fraud statute, 18 U.S.C. § 1341, is also key to understanding and applying other federal criminal fraud laws, notably including the wire fraud and bank fraud statutes, *id.* §§ 1343, 1344. See *Neder v. United States*, 527 U.S. 1, 20-21 (1999).

for mail fraud (and thus, as in petitioner Cordo's case, for conspiracy to commit mail fraud) could be based on simple omissions of material facts:

> When we speak of false representations, we mean statements that the speaker knows are false when the statements are made. Not only must the statement be false, it must also be material. In a case such as this, a material statement would be one that a potential investor might reasonably be expected to rely on in deciding whether or not to make an investment that you have heard about.
>
> An omission or half truth may also be a misrepresentation if the concealed or distorted information would be material to a potential person's decision whether or not to invest money in the proposition being presented.

(paragraphing simplified). The trial court's instructions thus mentioned the notion of concealment, without further elaboration, apparently equating it with the indictment's allegation of omissions.[3] Under this instruction, the jury was authorized to convict on the basis of material omissions alone, if convinced beyond a reasonable doubt.

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[3] The phrase "distorted" seemingly referred to the notion of a "half truth." Petitioner advances no objection to that concept, so long as "half truth" is limited to affirmative representations which, although literally true when taken out of context, are deemed essentially false by virtue of incompleteness when considered by the jury in the context of all the facts.

The panel opinion in the *Stackpole* case, Appx. B, incorporated by reference into the opinion on petitioner Cordo's appeal (Appx. A8 n.3), declines to find plain error in this instruction. The panel begins by mischaracterizing the appellant's claim and the challenged instruction (which it does not quote): "First, appellants argue that the District Court's jury instructions, which suggested that conviction for conspiracy to commit mail fraud could be based in part on material omissions, were plainly erroneous." Appx. B2. Petitioner's argument was not that the instruction permitted a fraud conviction to be "based in part on material omissions," but rather that the instruction allowed a verdict of mail fraud based on material "omission" alone, and without any mention, much less definition, of the requirement that there have been a fiduciary relationship.

It is no answer to this argument at all to say, as did the court below, that "appellants were prosecuted not just for mere nondisclosure but for a broad range of fraudulent conduct including misrepresentations, half-truths, as well as material nondisclosures intended to deceive." Appx. B2. The point is that under the jury instructions as framed, the jury was authorized to convict for omissions alone. True, the jury could as well have relied on the misrepresentations or on the half-truths, but it need not have. When a jury is authorized by the instructions to ground its verdict on any of several bases, and one of those is legally incorrect, a new trial is required. That there were valid fraud theories in this case as well as the invalid theory does not obviate the need for a new trial. See *Griffin v. United States*, 502 U.S. 46 (1991); *Yates v. United States*, 354 U.S. 298 (1957).

The rationale behind *Griffin* and *Yates*, this Court has explained, is that a jury cannot be presumed to be able to distinguish accurate statements of law from inaccurate statements.[4] Thus, contrary to the Third Circuit's suggestion, the presence of potential valid bases for the verdict, such as "misrepresentations" or "half-truths," does not save the day if the omission theory was improper; the presence in the instructions of an invalid theory destroys the integrity of the verdict.

The panel states that the other circuits "are generally in agreement" with its approach, Appx. B3, but this is not so. For example, the Fourth Circuit case cited by the panel holds that fraudulent concealment, as contrasted with mere nondisclosure, requires "deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter." *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000). The Second Circuit case cited reviews only the sufficiency of the evidence, not the validity of the jury instructions, but even then, it states, "True, an omission can violate the fraud statute only in the context of a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 119 (2d Cir. 2000). The Second Circuit explains that a disclosure duty can arise either from a fiduciary relationship or from the purveying of half-truths. The jury instructions in petitioner's case required neither. Similarly, the Eleventh Circuit in *United States v. Brown*, 79 F.3d 1550, 1557-58 (11th Cir. 1996), disallowed conviction on the basis of omissions in the absence of a

[4] The jury *is* presumed, on the other hand, to be able to distinguish a theory which is supported by *factually sufficient evidence* from one which is not.

fiduciary relationship or some prior, partial disclosure requiring inclusion of the omitted information to make the previous disclosure accurate, in other words, half truths. None of these is "generally in agreement" with the district court's instructions as delivered at petitioner's trial.

Contrary to the assertion of the court below, the decision in petitioner's case conflicts with most of the other circuits on this question. See, *e.g.*, *United States v. Colton, 231 F.3d 890, 899 (4th Cir. 2000); United States v. Autuori*, 212 F.3d 105, 119 (2d Cir. 2000); *United States v. Brown*, 79 F.3d 1550, 1557-58 (11th Cir. 1996); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249 (7th Cir. 1989); *United States v. Dowling*, 739 F.2d 1445, 1448-49 (9th Cir. 1984); *United States v. Irwin*, 654 F.2d 671, 679 (10th Cir. 1981).[5] It also conflicts with cases of this Court spanning a century or more, from *Cosby v. Buchanan*, 90 U.S. (23 Wall.) 420, 454 (1875), to *Chiarella v. United States*, 445 U.S. 222, 235 (1980).

The trial court failed to advise the jury that fraudulent concealment, as contrasted with mere nondisclosure, requires "deceptive acts or contrivances intended to hide

[5] Whether active concealment of facts can permit a mail fraud prosecution without a fiduciary or other duty is a somewhat more clouded question, but not one which is presented by these appeals. Compare *Colton*, 231 F.3d at 897-904 (arguing for coverage of active concealment without proof of fiduciary or legal duty), with *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir.) ("classical definition of fraud ... 'in its elementary common law sense'" does not encompass mere omission but only "'the deliberate concealment of material information in a setting of fiduciary obligation'"), *cert. granted & jmt. vacated on other grnds.*, 484 U.S. 807 (1987).

information, mislead, avoid suspicion, or prevent further inquiry into a material matter." *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000). Since the jury could easily have taken the trial court's undefined and unexplained use of the term "concealed" to mean "omitted," as the indictment did and as the prosecutor repeatedly did in closing argument. There is at least "'a reasonable likelihood that the jury has applied the challenged instruction in a way' that" would allow conviction for conduct which does not violate the statute. See *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), quoting *Boyde v. California*, 494 U.S. 370, 380 (1990). An appellate court is therefore bound to assume that the jury so understood it. See also *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

The court below failed to acknowledge another aspect of the plain error in the instruction to which petitioner's appeal objected. The indictment in this case made no mention of "concealment," only of what petitioner and his co-defendants allegedly omitted from their communications with victims. If "concealment" as included in the jury instructions meant no more than "omission" as alleged in the indictment, then the instruction was so mistaken under the well-established law of mail fraud as to constitute plain error, as just explained. Yet if "concealment," unexplained and unelaborated, would not have meant the same to the jury as "omission," then by instructing the jury on "concealment" as an elaboration of "omission" the court created a material variance from the indictment. *Stirone v. United States*, 361 U.S. 212, 218-19 (1960). Even under the plain error standard, this is presumptively prejudicial and requires reversal.

But that construction, equating concealment with omission and permitting conviction on that basis, would be wrong as a matter of law. In *McNally v. United States*, 483 U.S. 350, 358-59 (1987), this Court rejected the "disjunctive" reading of the mail fraud statute, under which the first ("scheme to defraud") clause is taken to be broader than the second ("to obtain money or property") and to encompass all material omissions. As the Court explained in *McNally*, the statute when enacted in 1872 originally contained only the "scheme to defraud" clause, which was susceptible to a rather *narrow* reading, in reliance on certain common law restrictions; the clause prohibiting all schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was added 1909 only to codify the holding in *Durland v. United States*, 161 U.S. 306 (1896), which had held the statute not to be limited to false statements of present facts.

Allowing conviction on the basis of an omission alone, even when called "conceal[ment]," was error. The jury instructions echoed the Third Circuit's decision in *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989), which allows a mail fraud conviction based on "deceitful statements of half-truths or the concealment of material facts." The court below also cited that case as precedent. Appx. B3. But *Olatunji* overlooks the critical limitation, recognized by the vast majority of other circuits, that nondisclosure is not covered by the mail fraud statute without proof of a fiduciary relationship, a legal duty of disclosure, or perhaps of active concealment. Compare *Colton*, 231 F.3d at 897-904 (4th Cir. 2000) (arguing for coverage of active concealment without proof of fiduciary or legal duty), with *United*

States v. Holzer, 816 F.2d 304, 307 (7th Cir.), *cert. granted & jmt. vacated on other grnds.*, 484 U.S. 807 (1987) ("classical definition of fraud ... 'in its elementary common law sense'" does not encompass mere omission but only "'the deliberate concealment of material information in a setting of fiduciary obligation'").

The Second Circuit, in contrast with the court below, has plainly stated, in *United States v. Von Barta*, 635 F.2d 999, 1006-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981), a prosecution of a securities broker, that nondisclosure is not covered by the mail fraud statute without proof of some duty to disclose. 926 F.2d at 1416. See also *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (breach of fiduciary duty to client by attorney).[6] Accord, *United States v. Dowling*, 739 F.2d 1445, 1448-49 (9th Cir. 1984) ("nondisclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged"; "independent duty may exist ... in the form of a fiduciary duty ... or may derive from an independent explicit statutory duty ...."); *United States v. Irwin*, 654 F.2d 671, 679 (10th Cir. 1981) ("no criminal conviction for failure to disclose when no duty to disclose is demonstrated"). Simple omission and possibly not even active concealment constitutes "fraud" under § 1341 in the absence of a special fiduciary relationship.[7]

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[6] As an "intangible rights" case, however, *Bronston* was effectively overruled on the merits by *McNally*.

[7] The Third Circuit once acknowledged this point, in a civil RICO action based on mail fraud. See *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1416 (3d Cir. 1991), character-

As a salesman of particular investment products -- not even claiming to be an independent investment adviser or broker, for example -- petitioner was not a fiduciary of his customers. As this Court concluded in *Chiarella v. United States*, 445 U.S. 222, 235 (1980), "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." Here, petitioner had no "duty to speak." The Court in *Chiarella* relied on Restatement of Torts (Second) § 551(2) (1977), *see* 445 U.S. at 228 & n.9, which would disallow even civil liability for nondisclosure in petitioner's circumstances. No case from this Court has approved a conviction based on allegedly material omissions made by a non-fiduciary and without reliance on any legal duty of disclosure.

Whether there may be any fiduciary duty is first a question of law, that is, whether the relationship which is alleged to have existed between the defendant(s) and the victim(s) is within the definition of "fiduciary." (Whether the defendants' conduct actually fit within any such legal category as a matter of fact, however, is of course then a question which the jury should decide under proper instructions.) Thus, only the jury could decide in this case whether Stackpole or Klepper had a fiduciary duty to the funeral directors and other investors. The court, however, would have to instruct the jury on what a fiduciary duty is and when it is that the law imposes one. (Cordo was a mere salesman, with no such duty under

_____(cont'd)

izing *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249 (7th Cir. 1989). Yet, despite misleadingly citing that case in the decision below, Appx. B2-3, the court of appeals has failed to follow and apply it in criminal cases, where the interpretation of the mail fraud law should, if anything, be stricter.

any view of the facts. His only fraud liability, however, is for conspiracy, so in his case the pertinent question for the jury would be his knowledge of the others' alleged fiduciary duties and his intent, as part of the alleged conspiratorial agreement, to exploit their breach of that duty.)[8] Since a reasonable jury could have decided that the defendants did not actually have a fiduciary or other duty of disclosure under the law, the Court below could not say on appeal that the error in omitting any instruction on that factor did not affect petitioner's substantial rights.

The court below failed to acknowledge or apply this Court's recent reminders that legally cognizable theories of a "scheme and artifice to defraud" under the mail fraud law are limited to those which would have been recognized in the common law as of 1872. See *Cleveland v. United States*, 531 U.S. 12, 18-20 (2000); *Neder v. United States*, 527 U.S. 1, 21-23 (1999); *McNally*, 483 U.S. at 358-59. Several of the Third Circuit's cases simply cannot be squared with that limiting principle, as Chief Judge Becker has recently acknowledged. See *United States v. Panarella*, 277 F.3d 678, 698 (3d Cir. 2002).[9]

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[8] Surely the prosecutor's suggestion, made four times in closing, that the jury could decide for themselves whether victims had "a right to know" certain things and whether the defendants thus had a duty to disclose -- admittedly predicated on "a personal or moral duty of disclosure," according to the government's appellate brief, Gov't CA3 Br. 38 -- was wrong. It was not "for the jury to decide," Gov't CA3 Br. 62, what the criminal law requires or what a person's "rights" are.

[9] The issue in *Panarella*, a case involving conflict of interest by a public official (which is considered a form of fiduciary violation) was the proper scope of 18 U.S.C. § 1346, the

Among such cases are those which fail to distinguish clearly between mere "omissions," on the one hand, and "elaborate efforts at concealment," on the other.

The rule that silence with respect to facts known to one party but not the other is not ordinarily fraudulent was first stated and applied by Chief Justice Marshall in *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817). It was followed throughout that Century, including the 1870's and into the era of 1909. See *Strong v. Repide*, 213 U.S. 419, 430 (1909); *Doyle v. Union Pacific Ry.*, 147 U.S. 413, 427-28 (1893); *Tyler v. Savage*, 143 U.S. 79, 98 (1892); *Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). The exception for fiduciary and trust relationships was equally well settled in 1872, but even that was narrowly construed. Compare *Cosby v. Buchanan*, 90 U.S. (23 Wall.) 420, 454 (1875) (family trustee in estate dispute; theory of fraudulent omission sustained),[10] with *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93 (2 Otto 92) (1876) (refusing to find fraud in nondisclosure, even by surety).

Prosser's hornbook likewise refers to "the older cases" which "commonly ... stat[e]" that an action for deceit will not lie on the basis of "mere silence, or a passive failure to disclose facts of which the defendant has knowledge ...." *Prosser and Keeton on the Law of*

_____(cont'd)

"honest and faithful services" definitional provision enacted by Congress in reaction to this Court's *McNally* decision. The principal questions at issue in *Panarella* are therefore not directly pertinent to the instant case.

[10] This case is captioned "*Crosby*" *v. Buchanan* in West's Supreme Court Reporter.

Torts § 106, at 737 (5th ed. W. Page Keeton 1984).[11] The only specific category of exception that Prosser & Keeton mention is for confidential or fiduciary relationships.[12] *See also* W. Page Keeton, *Fraud -- Concealment and Non-Disclosure*, 15 Tex.L.Rev. 1 (1937). The decision below is inconsistent with more than a century of precedent explaining the law of fraud.

Treatises contemporaneous with the enactment of the mail fraud law also exclude failures to disclose, in the absence of a fiduciary relationship, from the scope of what is deemed to be fraud. 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* 594 (1890) ("the general rule ... declares silence to have no effect"; in "transactions between parties to confidential relations ... silence is fatal"); *accord*, Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* ch. IX ("Silence; Duty to Speak") (1888); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* 39, 190-92 (1877); *see also* 1 Thomas M. Cooley, *A Treatise on the Law of Torts* 908 (3d ed. J. Lewis 1906)

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[11] The hornbook adds, "To this general rule, if such it be, the courts have developed a number of exceptions, some of which are as yet very ill defined, and have no very definite boundaries." *Id.* at 738. Under *Neder*, following *McNally v. United States*, 483 U.S. 350 (1987), such "ill defined" judge-made "exceptions" cannot support federal criminal liability.

[12] "Beyond this," adds the treatise, "there has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." *Id.* at 739. Again, this is hardly a criminal standard tied to the understandings of 1872.

("In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud."); 1 Charles L. Corbin, *Benjamin's Treatise on the Law of Sale of Personal Property* § 640, at 558 (4th Amer. ed. 1893) ("The mistaken belief as to facts [necessary to fraud] may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak"); *see generally* 1 Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. M. Bigelow 1886) (ch. VI ["Actual or Positive Fraud"], ch. VII ["Constructive Fraud"]).

As two other Circuits have emphasized, "Not all conduct that strikes the court [or a federal prosecutor] as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.'" *Reynolds*, 882 F.2d at 1252; accord, *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996). The federal government overreached in this case by not limiting the prosecution to false statements but instead emphasizing what the petitioner and his co-defendant's failed to tell their customers which a prudent investor would have wanted to know. In conflict with the other circuits, the Third Circuit's decision in this case endorses an unprecedented and dangerous expansion of the scope of the mail and wire fraud laws, in disregard of this Court's cases.

The inclusion of a legally-erroneous theory in the jury charge on a hotly contested element of the offense satisfies every aspect of the definition of plain error under Fed.R.Crim.P. 52(b). *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993); see *Pipefitters Local 562 v. United States*,

407 U.S. 385, 440-42 & n.52 (1972) (erroneous instruction explaining essential and contested element is plain error).

In conflict with numerous other circuits, the decision below upholds petitioner's conviction on the basis that omissions can be fraudulent even in the absence of a fiduciary relationship or some duty to disclose imposed by another applicable body of law. That is fundamentally wrong. The mail and wire fraud statutes do not codify through national criminal law a universal standard of total candor and full disclosure in all transactions, to be determined by juries (or appellate judges) on a case by case basis. The jury instructions in this case either invited a verdict on a theory that either required nothing more than an omission or else permitted a verdict on a basis of a theory of "concealment" which was neither defined nor charged in the indictment by the grand jury. Either way, the district court committed plain error.

Resolution of this division of opinion deserves the attention of this Court. For this reason, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner JOSEPH CORDO prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his conviction for conspiracy to commit mail fraud and related convictions for money laundering.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioner

October 14, 2003.

APPENDIX A
324 F.3d 223

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2392

UNITED STATES OF AMERICA,
v.
JOSEPH CORDO,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 00-cr-00046-4)
District Judge: Honorable William W. Caldwell

Argued December 16, 2002
Before: NYGAARD, ALITO and RENDELL,
Circuit Judges

***225** Peter Goldberger [Argued],
Ardmore, PA, for Appellant.

Theodore B. Smith, III [Argued],
Office of U.S. Attorney, Harrisburg, PA, for Appellee.

(Opinion filed April 4, 2003)

OPINION OF THE COURT

RENDELL, Circuit Judge.

Joseph Cordo appeals from a judgment of conviction and sentence entered in the District Court on May 22, 2001, following a jury trial for money laundering and related charges connected to his participation in several fraudulent investment schemes. We will affirm Cordo's conviction, but reverse and remand for resentencing.

I.

In the early 1990s, appellant Joseph Cordo, who worked as an insurance salesman, was introduced to Steven Stackpole. Together with Gavin Greene, Stackpole had formed an investment vehicle, Entertainment Architects ("EA"), which was selling an investment program called the "Prime Trust Guarantee." In order to attract investors, Greene and Stackpole had fabricated an EA brochure and various other promotional documents and literature, falsely suggesting that investments in EA would be secured by commercial real estate and other holdings. Cordo eventually began selling EA investments.

In late 1994, Stackpole and Greene incorporated in New Jersey as EA International ("EAI"), and formed EA International Trust ("EAIT"), a wholly owned subsidiary of EAI, with themselves as trustees. This new investment vehicle, EAIT, then opened an account with Maidstone Financial, Inc., a New York investment banking firm. For investors, the new investment program would -- at least nominally -- include positions

in blue chip stocks as well as the opportunity to participate in IPO's being underwritten by Maidstone. Investors were guaranteed a 12% annual return over five years, and were assured no risk of loss and that their funds were fully insured and IRA-qualified for tax purposes. Further, investors were told that no charges, fees, or commissions would be deducted from their investments.

All of these representations were complete fabrications. The funds were not insured, the plan was not IRA qualified, there was no way of guaranteeing returns, and extensive commissions and fees were deducted from the investments from the outset. Further, EA never disclosed that its sales force, such as Stackpole and Cordo, were not licensed to sell securities, nor that several of the individuals involved, including Stackpole and another co-defendant, Jeffrey Klepper, had been respectively sued for and convicted of fraudulent activities.

Between late 1994 and April 1997, thirty-four individuals invested $1.5 million in the program. Contrary to EA's representations, however, less than one third of that total was ever deposited into the Maidstone investment account, and the only other "investments" made by EA were the purchase of a two-bedroom condominium in New Jersey and a topless dance club in the Bronx, for a total of approximately $140,000.

Separate from the Maidstone investment activity, EA saw a potential market in obtaining better returns for funeral home directors on "pre-need" funds -- money they collect as prepayments for funeral services. Stackpole, Klepper, and Cordo were all involved in the exploration and ***226** development of the pre-need

business, and another company, Commonwealth Partnership Trust ("CPT"), was formed by Klepper and Cordo to handle much of the day-to-day operations of the new venture.

Pennsylvania law requires that pre-need funds be deposited in trust with a Pennsylvania Bank, so, in 1996, EAIT entered into an agreement with Nazareth National Bank whereby Nazareth would accept pre-need funds from funeral homes and immediately deposit them with EAIT for investment. The homes were guaranteed at least 7% in annual returns, as well as the secondary benefit of having CPT assume the relevant record-keeping obligations. CPT was also responsible for marketing the venture to funeral homes, and for its part EAI agreed to pay CPT 20% of each dollar invested.

Some time in 1996, Cordo significantly reduced his active participation in EAIT's investment operations to assist in the care of his father, who had been diagnosed with cancer. Although not heavily involved in the daily operations of CPT, Cordo was the company's Vice President and was paid as much as 4% of every dollar invested in the program. Throughout this period, Cordo received commission checks for his work with CPT and EAIT. Many of these checks were endorsed over to his mother, who would cash them or, occasionally, deposit them into her own account. Further, Cordo would sometimes receive between two and four checks written by EAI on the same day, each with an amount less than $10,000 but together totaling over that amount. On one occasion, a payment of over $72,000 was paid by way of two checks totaling just over $7000, with the balance deposited into a CPT money market account. Cordo

then opened a new checking account in CPT's name, wrote a check from the first account to the second, and then used most of the money in the new account for personal expenses. Also, from July 25, 1997, through August 19, 1998, thirteen checks were written directly from CPT to pay off a loan that Klepper had taken out on behalf of Cordo for the purchase of a boat.

Things began unraveling for EAIT in late 1997. Nazareth was served with a subpoena requesting all documents relating to its dealings with EAIT, and learned that Stackpole had been indicted for the misappropriation of $1.4 million of investments in the late 1980s and early 1990s, prior to the creation of EA. As a result, Nazareth immediately demanded an accounting, and subsequently discovered that less than half of its $5 million had been deposited into the Maidstone account.

After forcing Stackpole's resignation, Nazareth attempted to cover the death claim liabilities by obtaining one year term life insurance policies on the lives of the funeral homes' pre-need customers. On February 28, 1998, EAIT's Maidstone account, which by that time was worth only $440,000, was liquidated. EAIT's Park Avenue offices were abandoned in March, and in May Greene reported to Klepper and Cordo that EA had absolutely no remaining assets.

Nonetheless, the ventures continued to represent to investors that they remained in business. CPT sent account statements to its funeral home customers through June of 1998, statements that inexplicably reflected automatic increases in the EAIT accounts and no accounting for EAIT's extraordinary losses. In July 1998, in a phone conversation recorded by law enforcement personnel, Klepper represented to an investor that

EAIT was still in business and assured him that his investments were safe. In September 1998, Greene, Klepper, and Stackpole sent a letter to EAIT's individual investors stating that EAIT's offices had moved from Park Avenue *227 to an office suite in New Jersey, a "suite" that was in fact a Mail Boxes Etc. maildrop. Further, the four individual investors who had chosen to receive monthly interest checks continued to receive their disbursements through July of 1998, at which point EAIT was completely insolvent. Klepper then forwarded funds from CPT to an EAIT checking account, and two of the four investors continued to receive monthly checks through that October. Finally, a refund check to one investor who sought the return of his $7,000 investment was sent from EAIT after Cordo personally wired the money to the EAIT account.

Ultimately, the losses from the various schemes totaled approximately $5.9 million. A grand jury returned a 58 count indictment against Stackpole, Klepper, and Cordo. Cordo specifically was charged with: (1) one count of conspiracy to commit mail fraud, involving eleven mailings made between November 1994 and December 1998 in execution of a scheme and artifice to defraud individuals and funeral homes with a series of affirmative misrepresentations and omissions of material fact; (2) one count of conspiracy to commit money laundering by conducting financial transactions with the proceeds of criminal activity; and (3) thirteen substantive counts of money laundering, all relating to the payments made from CPT to pay off the loan taken out by Klepper for Cordo's purchase of the boat.

The jury returned a verdict convicting Stackpole and Klepper of various charges of mail fraud, money

laundering, and related offenses, and convicting Cordo on all the charges against him.[1] Cordo submitted a sentencing memorandum arguing that the counts against him should be grouped under U.S.S.G. § 3D1.2. The government opposed grouping, arguing that while the mail fraud counts imposed distinct harms on distinct victims, the sole victim of the money laundering was society at large. The District Court agreed. Cordo's offense level was therefore calculated based on two different count groups -- the mail fraud conspiracy in one group and the money laundering counts in another. Reflecting the two additional units for the two groups pursuant to U.S.S.G. § 3D1.4, Cordo's total offense level was set at 29, which, given his criminal history category of I, resulted in a sentencing range of 87-108 months. Ultimately, the District Court selected a sentence from the middle of the applicable range, and sentenced Cordo to 96 months imprisonment.[2] Judgment was entered May 22, 2001, and Cordo timely appealed. Bail pending appeal was denied, and Cordo is presently serving his sentence. The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] Cordo was also charged by indictment with one count of money laundering forfeiture, and entered a conditional guilty plea to that count after the jury returned a verdict against him on the principal offenses.

[2] Notably, Cordo was further sentenced to forfeit his interest in certain property, to pay a special assessment of $1500, and -- jointly and severally with his co-defendants -- to pay over $1.2 million in restitution.

II.

Cordo's appeal was consolidated with the appeals of his co-defendants Steven Stackpole and Jeffrey Klepper. All three co-defendants argued that: (1) the District Court's jury instructions were plainly erroneous because they suggested that conviction for conspiracy to commit mail fraud could be partly based on material omissions, and (2) the District Court's jury instruction on the liability of co-conspirators ***228** pursuant to *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), violated *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We find these arguments to lack merit.[3]

Cordo has argued separately that the government violated its obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose material information about the activities of Marshall Bernstein, the CEO and Chairman of Maidstone Financial, the investment bank used by EAIT, who was indicted for and later pled guilty to various charges of money laundering and securities fraud five months after Cordo was convicted. We note initially that Cordo raises this issue for the first time on appeal, and that generally it is "inappropriate to resolve a *Brady* claim in the first instance." *United States v. Ferri,* 778 F.2d 985, 997 (3d Cir. 1985); *see also United States v. Dansker,* 537 F.2d 40, 65 (3d Cir. 1976). However, we have examined

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[3] Our analysis of these issues is set forth in a separate, non- precedential opinion issued in the cases of Stackpole and Klepper. *See United States v. Stackpole,* No. 01-2033, 2003 WL 1785929 (3d Cir. 2002).

the merits of this argument and conclude there was no *Brady* violation because Cordo has shown neither that the government failed to disclose material within its possession nor the reasonable probability that the material could have changed the outcome at trial.[4]

The primary issue we consider in this appeal is whether Cordo's mail fraud and money laundering convictions should have been grouped under § 3D1.2 of the Sentencing Guidelines. The circumstances under which money laundering charges should be grouped with charges for other related conduct is an issue that is frequently confronted by the district courts, but has been only rarely addressed by our court.

A.

Section 3D1.2 of the Sentencing Guidelines provides that "all counts involving substantially the same harm shall be grouped" for sentencing purposes. At issue here is subsection (b) of that guideline, which provides that counts involve substantially the same harm when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2(b).[5]

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[4] Cordo also argues that there was an *Apprendi* violation because the indictment omits "factual averments of the requirements for *Pinkerton* liability" with regard to certain of the charges in the indictment. However, Cordo cites no legal authority or plausible factual basis for his argument, and we are unable to discern any potentially arguable violation of *Apprendi*.

[5] Noting that courts had split on the question, the

*229 The guideline commentary supplies further guidance in the proper application of this provision. First, Application Note 2 relevantly states:

> The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In

_____(footnote continued)

Sentencing Commission recently amended the relevant guidelines to explicitly require that mail fraud and money laundering charges such as those at issue here be grouped for sentencing. *See* U.S. Sentencing Guidelines Manual app. C, amend. 634 (2002). Although the amendment is not directly relevant to our discussion, it is notable that in reiterating that its amendment resolved the split, the Commission cited favorably to our decision in *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991), as well as to the Fifth Circuit's decision in *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995), and the Seventh Circuit's decision in *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), each of which, as we explain below, support the decision we reach today. Because Cordo is not eligible for the retroactive application of these amendments, however, *see United States v. Edwards*, 309 F.3d 110, 112 (3d Cir. 2002), our analysis is limited to the provisions of the Guidelines in place at the time of Cordo's sentencing. Accordingly, references throughout are to the November 1, 2000 Guidelines Manual.

> such cases, the counts are grouped together when the societal interests that are harmed are closely related .... Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group "counts involving substantially the same harm."

U.S. Sentencing Guidelines Manual § 3D1.2, cmt. 2 (2000). Continuing that general theme, Application Note 4 states:

> Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times.

Id. at cmt. 4.

Relying on these Application Notes, and subsection (b) itself, Cordo persuasively argues that the District Court erred in refusing to group his mail fraud and money laundering charges. Cordo urges that the individual investors and funeral homes were the identifiable victims of both his acts of fraud and his acts of money laundering. Accordingly, he argues that his conduct involved "the same victim[s] and two or more acts or transactions connected by a common criminal objective [and] constituting part of a common scheme or plan," and thus should have been grouped under the guidelines. U.S.S.G. § 3D1.2(b).

The issue of grouping matters here; if the charges had been grouped, Cordo would not have received a two level increase in offense level under § 3D1.4. Cordo's

base level would therefore have been lowered to 27 from 29, resulting in a sentencing range of 70-87 months instead of 87-108 months. Accordingly, Cordo's sentence of 96 months would have been reduced by at least nine, and up to sixteen, months.

The government asserts, in contrast, that there were different victims involved here. Whereas the mail fraud offenses obviously took as their victim the investors themselves, the government argues, the money laundering offenses effected only a societal harm. The District Court's brief discussion of the issue suggests that it viewed the analysis similarly:

> "Insofar as the grouping is concerned, I think the guidelines are looking at the same harms and the same victims in determining whether there should be a grouping or not. Here in my mind, we have separate harms and separate victims, and I think that has been well argued by counsel in their presentations. We will not group the two offenses of fraud and money laundering."

[3] We review the District Court's determinations of factual questions relating to sentencing under the clearly erroneous standard, but the "construction of § 3D1.2 is a legal issue for our plenary review." *United States v. Cusumano*, 943 F.2d 305, 313 (3d Cir. 1991); *see also, e.g., United States v. Rudolph*, 137 F.3d 173, 178 (3d Cir. 1998). We will reverse on this issue, and will accordingly remand for resentencing.

***230** B.

Our only precedent directly applicable to the question before us is our decision in *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991). *Cusumano*

involved a kickback scheme concerning an employee benefit plan, for which the defendant was convicted on a number of counts of conspiracy, embezzlement from an employee benefit plan, receipt of kickbacks relating to an employee benefit plan, laundering the proceeds of unlawful activity, and foreign travel in aid of racketeering. *Id.* at 307-08. Stating that "the money laundering ... is very much in the thick of th[e] entire scheme," the district court rejected the defendant's argument that the money laundering charges were "ancillary" to the primary kickback offenses, and grouped the charges under subsection (b). *Id.* at 312-13. We noted that although our review of the proper interpretation of § 3D1.2 is plenary, the only question at issue was the "essentially factual" one of the precise role of the money laundering in the scheme. We thus reviewed for clear error, agreed with the district court's determination that the money laundering was not "ancillary" to the scheme and, therefore, held that grouping was appropriate. *Id.* at 313. We stated:

> Even if we were to accept his dubious characterization of the facts, Cusumano's argument does not defeat the application of § 3D1.2(b) to this case. Cusumano was convicted under the money laundering statute, 18 U.S.C. § 1956. The issue here under the Guidelines is whether those convictions and his other convictions "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting a part of a common scheme or plan." The victim of all offenses in this case was the Fund and its beneficiaries. The evidence

> demonstrated that the unlawful kickbacks, the embezzlement, the conspiracy, the travel act violations and the money laundering were all part of one overall scheme to obtain money from the Fund and to convert it to the use of Cusumano [and his co-defendants]. Therefore, the district court's conclusion that the money laundering offenses were not "ancillary" is not clearly erroneous.

Id.

[4] Although the specific issue in *Cusumano* was "essentially factual" -- i.e., whether or not Cusumano's money laundering conduct was actually "ancillary" to his overall fraudulent scheme -- we indicated there that, under § 3D1.2(b), money laundering charges should be grouped with the charges that generated the funds unless the money laundering was somehow a separate operation, distinct from the scheme itself. *Id.* In *Cusumano* we made clear that money laundering offenses do not necessarily have society at large as their victim, and that, at least in some circumstances, money laundering will have an identifiable victim or victims for sentencing purposes. *Id.* And, where the money laundering's identifiable victims are identical to the victims of the related offenses, such as the targets of a fraudulent scheme -- the employee benefit fund and its beneficiaries in *Cusumano* -- subsection (b) calls for the counts to be grouped.

Until now we have not had direct occasion to reexamine this specific issue further. However, we have consistently referenced the reasoning we employed in *Cusumano*. In *United States v. Smith*, 186 F.3d 290 (3d Cir. 1999), which involved an embezzlement/kickback

scheme that operated against one private company, we noted that the district court had grouped the defendants' four charges -- conspiracy to defraud, interstate transport of stolen property, causing interstate transport *231 of stolen property with intent to distribute, and money laundering -- under subsection (b). *Id.* at 296-97. Although the issue was not directly before us, we stated that the grouping was "appropriate" because the company "was the 'same victim' and all transactions were connected to the kickback scheme." *Id.* at 297 (citing *Cusumano*, 943 F.2d at 312). Similarly, in *United States v. Diaz*, 245 F.3d 294 (3d Cir. 2001), which concerned a scheme against the Department of Education involving student loan checks, we noted that the District Court had grouped "several counts, including fraud and money laundering." *Id.* at 303. Citing subsection (b) and *Smith*, we stated:

> Under the sentencing guidelines, the District Court must group the counts into a single unit when there are multiple counts all involving substantially the same harm to the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. *The victim in all of Diaz's offenses was the same, the DOE.* All of her acts were part of a common plan.

Id. at 300 (emphasis added) (citations omitted); *see also United States v. Omoruyi*, 260 F.3d 291, 298 (3d Cir. 2001) (noting that "several counts, including mail fraud and money laundering, ha[d] been grouped [by the

district court] pursuant to U.S.S.G. § 3D1.2(b)").[6]

[5][6] The reasoning underlying *Cusumano, Smith,* and *Diaz* is highly persuasive. Section 3D1.2(b) requires the grouping of money laundering charges with the charges for related offenses if the conduct is all part of one scheme with the same identifiable victims. Where there is a single scheme or artifice to defraud a victim or set of victims -- an employee benefits fund and its beneficiaries, a private company, the Department of Education, or a collection of individual investors and funeral homes -- that results in charges for money laundering as well as the conduct that generated the subsequently laundered funds, the charges should be grouped for sentencing.

[7] Apparently crediting the arguments of the government, the District Court here held otherwise, holding that the money laundering and mail fraud

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[6] We also had occasion to examine the "victim" aspect of subsection (b) in *United States v. Rudolph,* 137 F.3d 173 (3d Cir. 1998), a case not involving money laundering. There we held that § 3D1.2(b) did not apply to a situation in which an INS special agent convicted of taking a bribe relating to providing a template to an unauthorized user had also sold a confidential presentence report. *Id.* at 181. We held that while society at large was the victim of the bribe, the individual for which the presentence report was prepared was the victim of the sale. *Id.* Judge Becker, concurring in the result, was of the view that the harm in both instances should be viewed in a less formalistic manner, as the "undermining of the citizenry's trust in government and its officials." *Id.* at 183 (Becker, J., concurring).

counts had different victims. Similarly, the government argues that the victims of the mail fraud were the investors and funeral homes, whereas the sole victim of the money laundering was society at large. Under the sentencing guidelines, however, the court is to consider the "victim of the offense for grouping purposes to be "society" only if the offense had "no identifiable victim." U.S. Sentencing Guidelines Manual § 3D1.2, cmt. 2 (2000). The Guidelines cite drug and immigration offenses as examples of such victimless crimes. *Id.*

[8] We cannot agree with the District Court that the money laundering here had no identifiable victim. Certainly there are cases where, for instance, the defendants are charged with laundering funds obtained from drug sales or gambling. But *232 this is not such a case. Here the acts of money laundering and mail fraud were all "in furtherance of a single fraudulent scheme" to defraud identifiable victims -- unsuspecting investors and funeral homes. *Id.* at cmt. 4.

The jury found that Cordo, Klepper, and Stackpole were involved in conspiracies to commit mail fraud and money laundering, and that Cordo committed thirteen substantive acts of money laundering in connection with his purchase of the boat. It is undisputed that all of the laundering activity at issue involved funds that were proceeds of the fraudulent investment scheme. The laundering was simply the final step in the operation. In other words, "the evidence demonstrated that" the mail fraud and money laundering were "part of one overall scheme to obtain money from [the investors] and to convert it to the use of" Cordo and his co-defendants. *Cusumano*, 943 F.2d at 313. Thus, just as in *Cusumano*, *Smith*, and *Diaz*, the acts of money laundering were a

further victimization of the defrauded investors, and therefore *did* have identifiable victims. Because this was a "single course of conduct with a single criminal objective." imposing "essentially one composite harm" on the "same victim[s]," the charges should have been grouped. U.S. Sentencing Guidelines Manual § 3D1.2, cmt. 4 (2000); *see also United States v. Wilson,* 98 F.3d 281, 282-83 (7th Cir. 1996); *United States v. Leonard,* 61 F.3d 1181. 1186 (5th Cir. 1995).

The government has offered no persuasive argument that would cause us to conclude otherwise. At oral argument, the government urged that this case was somehow distinguishable from *Cusumano* because the money laundering there had a different purpose and, further, involved a more substantial percentage of the funds obtained through the overall fraudulent scheme. Unlike *Cusumano,* the government argued, the money laundering activities here were meant only to conceal the defrauded funds, and thus did not victimize the defrauded investors but instead represented a distinct course of conduct imposing a wholly separate type of harm.[7] That conclusion simply does not follow. The

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[7] Although the government appeared to abandon the contention at oral argument, in its brief the government attempted to further distinguish *Cusumano* from the present facts by arguing that in that case "the district court and this Court determined that grouping was proper because *society* was the victim of all the offenses and the offenses constituted part of a common scheme or plan." That is quite clearly not the holding of *Cusumano,* which to the contrary explicitly stated that "[t]he victim of all offenses in this case was the Fund and its beneficiaries,"

money laundering here was the completion of a scheme to convert funds fraudulently obtained from those investors. The payments made directly from CPT for Cordo's boat, for instance, were nothing but the final act in the conversion of the funds, by way of the scheme, to Cordo's personal use. Similarly, the fortuitous fact that Cordo was only charged with laundering *some* of the funds obtained fraudulently does not mean that the money laundering was not an essential aspect of the overall fraudulent scheme. Notwithstanding the government's contentions to the contrary, we are unable to discern any distinction between the type of harm involved here and the type of harm involved in *Cusumano*. In both, there was a common scheme or plan involving multiple acts or transactions against identical victims, as expressly contemplated by § 3D1.2(b) grouping. *See Cusumano*, 943 F.2d at 313.

Our analysis finds support in the grouping decisions of several of our sister ***233** Courts of Appeals. In *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995), the defendant was convicted on a variety of charges, including money laundering, mail fraud, and wire fraud, relating to a telemarketing scam. *Id.* at 1183. The Court of Appeals for the Fifth Circuit, reviewing the District Court's grouping decision de novo, held that grouping was necessary. *Id.* at 1185-86. The court found that the money laundering activities "perpetuate[d]" the other crimes by "advanc[ing] the mail and wire fraud scheme that victimized nearly 500 people."

_____(footnote continued)

and never referenced society as the potential victim. *Cusumano*, 943 F.2d at 313.

Id. at 1186. The court explicitly endorsed our subsection (b) analysis in *Cusumano,* stating that the situations were similar in that the money laundering involved in both *Cusumano* and *Leonard* was not "ancillary" or "neatly separated" from the other offenses, but was instead part of "a single, integrated scheme." *Id.* Accordingly, the court upheld the District Court's grouping decision.[8]

The same reasoning was adopted by the Seventh Circuit Court of Appeals in *United States v. Wilson,* 98 F.3d 281 (7th Cir. 1996). In *Wilson,* the defendant was a securities broker who "conducted a Ponzi scheme that defrauded forty-eight victims of more than three million dollars." *Id.* at 282. Like the scheme involved here, while the investors were told that their money was being placed into secure investments, Wilson deposited the funds into a personal account and "used them for both personal expenses and to cover interest and dividend payments owed to previous investors." *Id.* Wilson pled guilty to charges of mail fraud and money laundering, and on appeal argued that the District Court erred in failing to group the charges. *Id.*

The Court of Appeals for the Seventh Circuit agreed, and reversed the District Court's failure to group the charges for purposes of sentencing. *Id.* at

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[8] Although the Fifth Circuit's analysis seems most relevant to subsection (b), and although the Court explicitly "follow[ed]" our subsection (b) analysis in *Cusumano,* the court indicated that it was holding that grouping was necessary under subsection (d). *Leonard,* 61 F.3d at 1185-86; *see also Wilson,* 98 F.3d at 282-83.

282-84. The court first reiterated that the "central purpose" of the grouping provisions was to "'combine offenses involving closely related counts.'" *Id.* at 282 (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995)). The court then noted that "Wilson's convictions for mail fraud and money laundering without question me[t] that criterion," as "[a]ll of the money that Wilson laundered was money defrauded from his investors." *Id.* at 282. Thus, the court "reject[ed] the government's contention that these offenses [we]re inappropriate for grouping because they involve[d] different victims and thus different harms." *Id.* at 283. Although the court indicated that it may agree that "[i]n the abstract" the "victim of mail fraud is the person defrauded, while the victim of money laundering is society at large," the court stated:

> [W]hen the defendant is convicted of laundering the proceeds of his fraud in order to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds, ... there is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or "cleanse" the funds of which she was defrauded. More to the point, the money laundering in this case served to perpetuate the very scheme that produced the laundered funds.

Id. (quotations omitted); *see also United States v. Rudolph*, 137 F.3d 173, 184 (3d Cir. 1998) (Becker, J., concurring) (praising the Seventh Circuit's approach in *Wilson*). ***234** The Court then quoted at length from *Leonard*, noted that decision's reliance on our opinion

in *Cusumano,* and, like *Leonard,* held that grouping was required under subsection (d). *Id.* at 283-84.

III.

Cordo's acts of mail fraud and money laundering were part of a common scheme involving identical victims -- defrauded investors. We therefore agree with Cordo that the District Court erred in failing to group his mail fraud and money laundering counts pursuant to § 3D1.2(b), resulting in an incorrect base offense level and sentence.

Accordingly, we will REVERSE the District Court's order, and REMAND for a new sentencing consistent with this opinion.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-2033 and 01-2369

UNITED STATES of AMERICA,
v.
R. Steven STACKPOLE,
Appellant No. 01-2033,

UNITED STATES of AMERICA,
v.
Jeffrey KLEPPER,
Appellant No. 01-2369.

Appeals from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Nos. 00-cr-00046-1, 3)
District Court Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
Dec. 20, 2002.
Before NYGAARD, ALITO and RENDELL,
Circuit Judges
Decided April 3, 2003.

OPINION OF THE COURT

RENDELL, Circuit Judge.

****2** Steven Stackpole and Jeffrey Klepper appeal from their judgment of conviction and sentence following

a jury trial for mail fraud, money laundering, and related charges connected to their participation in a Ponzi scheme. The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We will affirm.

As we write solely for the parties, we need not detail the factual background of this appeal. Before us, appellants present two issues. First, appellants argue that the District Court's jury instructions, which suggested that conviction for conspiracy to commit mail fraud could be based in part on material omissions, were plainly erroneous.[1] We disagree. Appellants rely on the long settled common law rule that the failure to divulge material information is only fraudulent where there was some duty to disclose. *See Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980); *Copper Process Co. v. Chicago Bonding & Ins. Co.*, 262 F. 66 (3d Cir. 1920). But the record here makes clear that appellants were prosecuted not just for mere nondisclosure, but for a broad range of fraudulent conduct including misrepresentations, half-truths, as well as material nondisclosures intended to deceive. We have stated that *843 fraud convictions such as these are valid where they are premised on "a scheme or artifice to defraud ... 'involv[ing] some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and **3 comprehension,'" and that "[t]he scheme need not involve affirmative misrepresentation." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d

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[1] As there was no objection to the jury instructions at trial, counsel has conceded that our review is for plain error only. *See* Fed.R.Crim.P. 52(b).

1406, 1415 (3d Cir.1991) (quoting *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978)); *see also United States v. Olatunji*, 872 F.2d 1161, 1166-67 (3d Cir. 1989). Other Courts of Appeals are generally in agreement. *See, e.g., United States v. Autuori*, 212 F.3d 105 (2d Cir. 2000); *United States v. Colton*, 231 F.3d 890 (4th Cir. 2000); *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996); *Emery v. American General Finance, Inc.*, 71 F.3d 1343 (7th Cir. 1995); *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982). Accordingly, there was no plain error in the District Court's instructions.

Appellants' second argument is apparently that the District Court's instruction on the liability of co-conspirators pursuant to *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), was somehow in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, appellants have not made at all clear how or why they believe an *Apprendi* violation to have occurred. In *Apprendi*, the Supreme Court held that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Here, the District Court gave a proper *Pinkerton* instruction, and the jury considered all of the elements of the crimes charged as constitutionally required. Accordingly, we are unable to divine any violation of *Apprendi*.

The orders of the District Court will be AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

01-2392

UNITED STATES OF AMERICA
v.
JOSEPH CORDO,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 00-cr-00046-4)
District Judge: Honorable William W. Caldwell

Argued December 16, 2002
Before: NYGAARD, ALITO and RENDELL,
Circuit Judges

Present: SCIRICA, Chief Judge, SLOVITER,
NYGAARD, ALITO, ROTH, McKEE, RENDELL,
BARRY, AMBRO, FUENTES, and SMITH,
Circuit Judges

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/Marjorie O. Rendell
Circuit Judge

Dated: **MAY 20 2003**